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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
The McClatchy Company, *et al.*,	)	Case No. 20-10418 (MEW)
Debtors.	)	Jointly Administered

RESPONSE OF THE PENSION BENEFIT GUARANTY CORPORATION TO DEBTORS' MOTION FOR DETERMINATION THAT DEBTORS MEET THE FINANCIAL REQUIREMENTS FOR A DISTRESS TERMINATION OF THEIR PENSION PLAN

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PRELIMINARY STATEMENT

The Pension Benefit Guaranty Corporation ("PBGC"), the federal agency charged with administering the pension plan termination provisions of Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. §§ 1301-1461 (2012 & Supp. V 2017), hereby responds to the Debtors' motion, filed February 13, 2020, asking this Court to determine that The McClatchy Company ("McClatchy") and its debtor affiliates (collectively the "Debtors")[1] meet the requirements for a "distress termination" of The McClatchy Company Retirement Plan (the "Pension Plan") under the "reorganization in bankruptcy" test set forth in 29 U.S.C. § 1341(c)(2)(B)(ii)(IV), and approve the termination of the Pension Plan (the "Distress Motion").

PBGC, as a party in interest and creditor in this proceeding, does not object to the Distress Motion, but files this Response to advise the Court of the agency's views on the proper legal standards for determining whether the Debtors meet the "reorganization in bankruptcy" distress test for the Pension Plan. As the agency charged with administering the distress termination provisions of Title IV of ERISA, PBGC believes its views on the correct

[1] The Debtors in these chapter 11 cases are: The McClatchy Company; Aboard Publishing, Inc.; Bellingham Herald Publishing, LLC; Belton Publishing Company, Inc.; Biscayne Bay Publishing, Inc.; Cass County Publishing Company; Columbus-Ledger Enquirer, Inc.; Cypress Media, Inc.; Cypress Media, LLC; East Coast Newspapers, Inc.; El Dorado Newspapers; Gulf Publishing Company, Inc.; Herald Custom Publishing of Mexico, S. de R.L. de C.V.; HLB Newspapers, Inc.; Idaho Stateman Publishing, LLC; Keltatim Publishing Company, Inc.; Keynoter Publishing Company, Inc.; Lee's Summit Journal, Incorporated; Lexington H-L Services, Inc.; Macon Telegraph Publishing Company; Mail Advertising Corporation; McClatchy Big Valley, Inc.; McClatchy Interactive LLC; McClatchy Interactive West; McClatchy International Inc.; McClatchy Investment Company; McClatchy Management Services, Inc.; McClatchy News Services, Inc.; McClatchy Newspapers, Inc.; McClatchy Property, Inc.; McClatchy Resources, Inc.; McClatchy Shared Services, Inc.; McClatchy U.S.A., Inc.; Miami Herald Media Company; N & O Holdings, Inc.; Newsprint Ventures, Inc.; Nittany Printing and Publishing Company; Nor-Tex Publishing, Inc.; Olympian Publishing, LLC; Olympic-Cascade Publishing, Inc.; Pacific Northwest Publishing Company, Inc.; Quad County Publishing, Inc.; San Luis Obispo Tribune, LLC; Star-Telegram, Inc.; Tacoma News, Inc.; The Bradenton Herald, Inc.; The Charlotte Observer Publishing Company; The News & Observer Publishing Co.; The State Media Company; The Sun Publishing Company, Inc.; Tribune Newsprint Company; Tru Measure, LLC; Wichita Eagle and Beacon Publishing Company, Inc.; Oak Street Redevelopment Corp.; and Wingate Paper Company.

interpretation of the statute are entitled to considerable weight and will help inform the Court's consideration of this critically important issue.[2]

Under ERISA, a bankruptcy court's role in the distress termination process is limited to a determination under one prong of the "reorganization in bankruptcy" test as to whether a debtor "will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process" unless a pension plan is terminated.[3] This rigorous test requires a debtor to demonstrate that termination is necessary to avoid a liquidation of its business.[4] A debtor must therefore show that it has pursued and exhausted all realistic measures short of termination that would make funding and maintaining the pension plan affordable, such as obtaining minimum funding waivers or freezing future accruals of benefits under the pension plan, cutting non-pension expenditures such as payroll, capital acquisitions and overhead so that more cash flow will be available for pension payments, or finding an investor or lender who will finance the debtor while it continues to fund and maintain the pension plan. PBGC urges the Court to carefully review the evidence presented by the Debtors in support of the Distress Motion and to make the necessary determination as to whether the strict distress test is met.

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[2] *See Beck v. PACE Intl. Union*, 127 S. Ct. 2310, 2317 (2007) ("We have traditionally deferred to the PBGC when interpreting ERISA, for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.'") (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 725-26 (1989)). *See also PBGC v. LTV Corp.*, 496 U.S. 633, 647-48 (1990) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-43 (1984)).

[3] 29 U.S.C. § 131(c)(2)(B)(ii)(IV); 29 C.F.R. § 4941.41(c)(2)(iv).

[4] *See, e.g.*, *In re US Airways Group, Inc.*, 296 B.R. 734, 743 (Bankr. E.D. Va. 2003).

I. PBGC AND THE DEBTORS' PENSION PLAN

PBGC is a wholly-owned United States government corporation and agency that administers the defined benefit pension plan termination insurance program established under Title IV of ERISA. When a pension plan covered by Title IV of ERISA terminates without sufficient assets to pay benefits, PBGC generally becomes trustee of the plan and, subject to certain statutory limitations, pays the plan's unfunded benefits from PBGC's insurance funds.[5]

The Pension Plan is a tax-qualified defined benefit pension plan that is covered by Title IV of ERISA. As of January 1, 2019, the Pension Plan covered 24,056 total participants, of which 1,704 are active employees, 11,524 will receive deferred benefits, and 10,828 are currently receiving benefits. McClatchy is the contributing sponsor of the Pension Plan, and the other Debtors are members of McClatchy's controlled group.

On February 13, 2020, the Debtors filed the Distress Motion with the Court, seeking a distress termination of the Pension Plan with April 13, 2020, as the effective termination date. In the Distress Motion, the Debtors have asked the Court to determine that each of the Debtors meets the "reorganization in bankruptcy" distress test under 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). Concurrent with filing their Distress Motion, the Debtors filed a Notice of Intent to Terminate ("NOIT") the Pension Plan with PBGC.

If the Pension Plan terminates, the Debtors will be jointly and severally liable for the Pension Plan's unfunded benefit liabilities, any unpaid minimum funding contributions, and any unpaid PBGC insurance premiums. Additionally, following discharge or dismissal from chapter

[5] *See* 29 U.S.C. §§ 1321, 1322, 1361.

11 reorganization proceedings, the reorganized Company will become liable for termination premiums under 29 U.S.C. § 1306(a)(7) ("Termination Premiums").[6]

PBGC expects to file the following joint and several claims relating to the Pension Plan:

(1) for unfunded benefit liabilities in the amount of $1.0088 billion under 29 U.S.C. § 1362(b), contingent on the termination of the Pension Plan;

(2) on behalf of the Pension Plan, for unpaid minimum funding contributions in the amount of $80,428,564 under 26 U.S.C. §§ 412, 430, and 29 U.S.C. § 1082; and

(3) for unpaid insurance premiums due to PBGC under 29 U.S.C. § 1307.

In addition, following discharge or dismissal from these reorganization proceedings, if the Pension Plan has terminated, the reorganized Company will be liable to PBGC for Termination Premiums in the estimated amount of $30.07 million per year for three years.

II. STATUTORY AND REGULATORY REQUIREMENTS FOR DISTRESS TERMINATION

Title IV of ERISA provides the exclusive means for terminating a defined benefit pension plan.[7] To proceed with a distress termination, McClatchy, as the sponsor of the Pension Plan, and the other 55 debtors, as members of its controlled group, each must satisfy one of the four statutory distress termination tests under 29 U.S.C. § 1341(c)(2)(B). These tests are: (a) liquidation in bankruptcy; (b) reorganization in bankruptcy; (c) inability to pay debts when due; and (d) unreasonably burdensome pension costs.[8]

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[6] The Debtors are liable for unfunded benefit liabilities and unpaid minimum funding contributions on the termination date of the Pension Plan. In the case of a distress termination, the termination date proposed by the administrator of the pension plan is established as the date of plan termination if the PBGC agrees. 29 U.S.C. § 1348(a)(2).

[7] *See* 29 U.S.C. § 1341(a)(1); *Hughes Aircraft Co. v. Jacobsen*, 525 U.S. 432, 446 (1999).

[8] 29 U.S.C. § 1341(c)(2)(B). *See also* 29 C.F.R. Part 4041, Subpart e.

Under ERISA's "reorganization in bankruptcy" test, the Debtors must make a showing that they will be unable to pay all of their debts under a plan of reorganization and will be unable to continue in business upon emergence from chapter 11.[9] Distress termination provisions further provide that a pension plan may terminate *only* if: (1) the plan administrator provides affected parties, including PBGC and plan participants, at least 60-days advance written notice of its intent to voluntarily terminate the pension plan, as required under 29 U.S.C. § 1341(a)(2); (2) the plan administrator provides PBGC with the information set forth in 29 U.S.C. § 1341(c)(2)(A); and (3) PBGC makes certain determinations based upon the required disclosures.[10] Specifically, PBGC must determine and notify the plan administrator as to whether the NOIT complies with ERISA's requirements for distress termination.[11] PBGC must also evaluate the pension plan's sufficiency for guaranteed benefits or benefit liabilities,[12] and it must determine that each member of the plan sponsor's controlled group, as defined under 29 U.S.C. § 1301(a)(14), meets the requirements of one of the four distress tests.[13]

Congress first enacted the distress termination provisions as part of the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), Pub. L. No. 99-272, 100 Stat. 237 (1986). SEPPAA did not set an explicit standard under the "reorganization in bankruptcy" test; it merely required the bankruptcy court to "approve[] the termination."[14] Congress adopted an explicit

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[9] 29 U.S.C. § 1341(c)(2)(B)(ii)(IV).

[10] 29 U.S.C. § 1341(c)(1)(A), (B); 29 C.F.R. § 4041.44(a) and (b).

[11] *Id.*

[12] 29 U.S.C. § 1341(c)(3)(A); 29 C.F.R. § 4041.47.

[13] 29 U.S.C. § 1341(c)(2)(B)(i), (ii) and (iii).

[14] Pub. L. 99-272, § 11009, 100 Stat. 237, 249-250.

standard in 1987 when it enacted the Pension Protection Act ("PPA"), Pub. L. 100-203, 101 Stat. 1330-333. The PPA amendments specifically required a chapter 11 debtor to show that it "will be unable to pay all of its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization."[15] As explained by Rep. Schultz, a PPA conferee:

> The conference agreement narrowed the ability of a pension plan sponsor to transfer his pension plan obligations to the PBGC by the mere filing of a bankruptcy petition under chapter 11. Under the conference agreement a bankruptcy court judge will not allow a distress termination of a pension plan unless he determines that the company is unable to pay its debts pursuant to a plan of reorganization and continue in business outside of chapter 11.
>
> Furthermore, a pension plan termination would be allowed *only if it otherwise would force the sponsor into liquidation*; and where, for example, the court had found that the sponsor had made meaningful sacrifices, such as in its pay package agreements.

133 Cong. Rec. H11970, Dec. 21, 1987 (emphasis added).

Therefore, as one court has observed, the purpose of the statute is to "limit to cases of severe business hardship the ability of plan sponsors to terminate their pension plans and thereby shift liability for guaranteed benefits onto other insurance premium payers in the PBGC programs."[16] Thus, in a distress termination, the appropriate standard of review in the "reorganization in bankruptcy" context is "whether *but for* the termination of the pension plan, the debtor will not be able to pay its debts when due and will not be able to continue in

[15] Pub. L. 100-203, 101 Stat. 1330-333.

[16] *In re US Airways Group, Inc.*, 296 B.R. 734, 743 (Bankr. E.D. Va. 2003), *quoting In re Wire Rope of Am., Inc.*, 287 B.R. 771, 777 (Bankr. W.D. Mo. 2002). The legislative history shows that "[t]he basic policy of the legislation is to limit the ability of plan sponsors to shift liability for guaranteed benefits onto other PBGC premium payers and to avoid responsibility for the payment of certain nonguaranteed benefits, to cases of severe business hardship." H.R. Rep. No. 300, 99th Cong., 1st Sess. 278, 279 (1985), *reprinted in* 1986 U.S.C.C.A.N. 929-30.

business."[17] Additionally, "[t]he reference [in the statute] to 'a' plan of reorganization does not permit a distress termination simply because a particular plan requires it; rather the test is whether the debtor can obtain confirmation of *any* plan of reorganization without termination of the retirement plan."[18]

In making its determination under the "reorganization in bankruptcy" test, a bankruptcy court should therefore inquire whether the debtor has exhausted all other less drastic measures that would enable the debtor to pay its debts under a plan of reorganization and continue in business outside chapter 11. These measures can and should include evidence from the debtor of such considerations as the costs of maintaining the pension plan if funding waivers are obtained,[19] the costs of maintaining the plan if a freeze on future accrual of benefits was put in place, the projected costs of the pension plan using different actuarial assumptions or cost methods, and evidence on whether there are other cost savings or discretionary spending in the debtor's business plan that can be used to fund the pension plan.[20] Once a record on these issues is fully developed, the court can decide whether "but for" the termination of the pension plan, the debtor would have to liquidate, and thereby make the necessary findings required by ERISA.

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[17] *In re Resol Mfg. Co.*, 110 B.R. 858, 862 (Bankr. N.D. Ill. 1990) (emphasis added); *see also Wire Rope*, 287 B.R. at 777.

[18] *US Airways Group, Inc.*, 296 B.R. at 743-44. *See also Philip Servs.*, 310 B.R. at 808, *quoting US Airways*, 296 B.R. at 743-44; *Wire Rope*, 287, B.R. at 777; *In re Sewell Mfg. Co.*, 195 B.R. 180, 185 (Bankr. N.D. Ga. 1996).

[19] A defined benefit plan must be funded in accordance with the minimum funding standard prescribed by the Internal Revenue Code ("IRC" or "I.R.C.") and ERISA. I.R.C. §§ 412, 430; 29 U.S.C. § 1082. The sponsor of a defined benefit pension plan may request from the Internal Revenue Service a waiver of the minimum funding contributions owed for a plan year if the employer is unable to satisfy the minimum funding standards for the plan year without temporary substantial business hardship. I.R.C. § 412(c).

[20] *See, e.g.*, *US Airways Group, Inc.*, 296 B.R. at 744-46; *Phillip Servs.*, 310 B.R. at 808.

III. COMPLETION OF A DISTRESS TERMINATION

The statute gives the bankruptcy court an important and clearly defined role—to determine whether the Debtors meet the "reorganization in bankruptcy" test. Here, while the Court will determine whether the Pension Plan must be terminated in order to enable the Debtors to reorganize, the ultimate determination of whether the Pension Plan may be terminated in a distress termination rests with PBGC.[21] As one court explained:

> [T]he Court does not find itself faced with the ultimate question of the Debtor's entitlement to the termination of its pension plan. Instead, the Court simply must perform one narrow factual determination, the satisfaction of which will compose a single element in the Debtor's individual case for reorganizational "distress." The ultimate sufficiency of that distress showing, as well as the adequacy of the Debtor's required disclosures and the qualification of any "controlled group" parties, then will become a collective matter for the PBGC's consideration as it makes a final determination of the Debtor's right to a distressed termination.

In re Sewell Mfg. Co., 195 B.R. 180, 185 (Bankr. N.D. Ga. 1996).

If the Court approves the Distress Motion, PBGC will proceed with its processing of the distress application. PBGC will be bound by the Court's determination that the Debtors will be unable to reorganize if the Pension Plan is not terminated.[22] In addition, PBGC will review information and distress application materials made available by the Debtors, and evaluate "whether the requirements for a distress termination have been satisfied, including whether each controlled group member satisfies one of the distress tests set forth in section 4041(c)(2)(B) of ERISA."[23] Specifically, any non-debtor controlled group members must meet one of the three tests (the "liquidation test," the "business continuation test," or the "pension costs test") set forth

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[21] *See Wire Rope*, 287 B.R. at 777.

[22] 29 U.S.C. § 1341(c)(2)(B)(ii); 29 C.F.R. § 4041.41(d) .

[23] *See* Debtors' Distress Motion Ex. B at ¶8(a)(7) (PBGC Directive No. TR 00-020; 29 U.S.C. § 1341(c)(2)(B)

in 29 U.S.C. § 1341(c)(2)(B)(i) and (iii). PBGC's investigation into that matter is ongoing. Additionally, PBGC will determine whether the Pension Plan is sufficient for guaranteed benefits and whether PBGC trusteeship is appropriate.[24]

IV. CONSIDERATION OF DEBTORS' DISTRESS MOTION

The Debtors' Distress Motion asserts that they "certainly cannot continue in business if the [Pension] Plan is not terminated, [but] they can meet [their] obligations outside of Chapter 11 if the [Pension] Plan is terminated."[25] The Debtors' motion also explains the steps they have taken to avoid the Pension Plan's termination, including the Debtors' digital transformation, expense-cutting initiatives, paying down debt, and consolidation attempts. Thus, when determining whether the Debtors meet the "reorganization in bankruptcy" test, the Court must closely scrutinize the Debtors' financial circumstances, including the projected costs of maintaining the Pension Plan as well as the Debtors' financial resources and projections.

PBGC requests that the Court follow the statutory language in evaluating the Debtors' assertions of fact for termination and in thereby determining whether the Debtors will be forced into liquidation *but for* termination of the Pension Plan. Based on an assessment of the sufficiency of the Debtors' resources to fund and maintain the Pension Plan, the Court should approve the Distress Motion *only if* it finds that the Debtors would be unable to pay all their debts and continue in business outside of the bankruptcy, unless the Pension Plan is terminated.

CONCLUSION

Based on the information available, PBGC does not object to the Debtors' Distress Motion. The Debtors must make the factual and legal showings required by ERISA, however, to

[24] Debtors' Distress Motion Ex. B at ¶8(a)(7); 29 U.S.C. § 1341(c)(3).

[25] Debtors' Distress Motion ¶ 46.

support their assertion that they meet the strict criteria of the "reorganization in bankruptcy" distress test for termination of the Pension Plan under Title IV of ERISA. The Court may thereby determine that termination of the Pension Plan is necessary for the Debtors to generate enough cash flow to meet obligations under any feasible plan of reorganization post-emergence.

Dated: May 12, 2020

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
The McClatchy Company, *et al.*,	)	Case No. 20-10418 (MEW)
Debtors.	)	Jointly Administered

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2020, the Response of the Pension Benefit Guaranty Corporation to Debtors' Motion for Determination that Debtors Meet the Financial

Requirements for a Distress Termination of their Pension Plan was filed electronically through the Court's NextGen system, which caused all parties or counsel that requested notification to be served by the Court's NextGen system on the date of filing and the following parties via the method indicated:

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